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EDITORIAL COMMENT

A PERMANENT COURT OF INTERNATIONAL JUSTICE

For years partisans of justice between nations have advocated the establishment of a High Court of the Nations to decide every dispute between States, parties to its creation, according to the rules of law which in the opinion of the judges of such a court apply to the dispute and which has been submitted by one or other state in controversy to the court.

The First Hague Peace Conference of 1899 declared itself in favor of the arbitration of disputes between States as the most equitable way of settling and getting them out of the way. It went further by providing a permanent panel of arbiters from whom a temporary tribunal could be chosen by the States in controversy for the adjustment of the dispute upon the basis of respect for law. The conference did not stop here. It provided a code of arbitral procedure to be used by the parties unless they should care to vary it and adopt a procedure more suitable to the particular case.

This was a great step in advance. It was not a permanent court, but it made it easier to take the next step.

This the Second Hague Peace Conference of 1907 did by adopting a draft Convention for the establishment of a Court of Arbitral Justice. This Convention provided for the organization, jurisdiction and procedure of a permanent court to be located at The Hague, composed of judges to be appointed in advance of cases and to serve for a period of twelve years.

The Conference was, however, unable, owing to the pressure of other business and the limited time at its disposal, to devise a method of selecting the judges generally acceptable to its members.

The acceptance of the principle of permanence and the adoption of a draft convention for a permanent court of justice as distinct from a temporary court of arbitration made it easier to take the third step.

This an Advisory Committee of Jurists did at The Hague in the months of June and July of the present year by agreeing upon a

method of selecting the judges acceptable to the representatives of ten states. This Committee was appointed by the Council of the League of Nations, and was, in the language of the League of Nations Official Journal for June, 1920, "composed of ten members, five of whom are nationals of the five great Powers and five nationals of smaller Powers," as follows: Messrs. Adatci (Japan), Altamira (Spain), Bevilaqua (Brazil), replaced by M. Fernandes, Baron Descamps (Belgium), Hagerup (Norway), de Lapradelle (France), Loder (Netherlands), Lord Phillimore (Great Britain), Messrs. Ricci Busatti (Italy), and Elihu Root (United States).

The members of the Committee were without instructions; they were not, however, free agents. They were appointed by the Council of the League of Nations to advise that body in the performance of its duties under Article 14 of the Covenant:

> The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

The Committee was therefore to draft a permanent Court of Justice, not of Arbitration, to render judgment between parties and to advise the Council or Assembly in other cases.

To this extent the Committee was to act under instructions. Again Article 13 of the Covenant practically settled the jurisdiction of the Court, providing as it does:

> The Members of the League agree that whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration.
>
> Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.
>
> For the consideration of any such dispute the court of arbitration to which the case is referred shall be the court agreed on by the parties to the dispute or stipulated in any convention existing between them.

Then, again, while the court was to be principally the court of the members, it was undoubtedly to be open to non-members upon such

terms as the Council, in pursuance of Article 17 of the Covenant, may lay down.

The difficulty confronting the Advisory Committee in 1920 was the difficulty that confronted the Second Hague Conference in 1907, an acceptable method of selecting the judges. The Committee succeeded where the Conference failed. It was able to and actually did take the third step. How and why? Because the Covenant of the League of Nations provided for two organs. In the Council the five great Powers are permanently represented, while all the other members of the League are represented by four elective members. The five, therefore, have a majority of one. In the Assembly each Power has one vote, although it may have as many as three representatives. The smaller Powers are therefore in the majority.

The interests of the great Powers are represented in the Council; the interests of the smaller Powers are represented in the Assembly.

Mr. Root, therefore, proposed that the judges should be selected by the concurrent action of the Council and the Assembly. In this way the interests of the great and the smaller Powers would be safeguarded and each body would have a veto upon the abuse of authority by the other. A failure to agree is to be met by a conference committee to consist of an equal number of members chosen by the Council and Assembly, as is the practice of the Senate and House of Representatives of the United States. The list of judges is to be selected by the members of the Permanent Court of Arbitration, each national group proposing two candidates without regard to nationality. From these persons the Council and Assembly are to elect. The details, the result of much discussion and the contribution of various members, are stated in Articles 4, 5, 6, 7, 8, 9, 10, 11, 12 of the Project.

The judges are to be "elected regardless of their nationality," in the sense that no nationality is of right to be represented in the court. They are to be eligible for appointment to the highest judicial posts of their respective countries or are to be international lawyers of repute (Article 2).

The judges are, according to Article 3, of two classes: titular judges (in the French text) or judges (in the English text); and deputy judges to take the place of judges of the court in case of temporary vacancy, or in the case of a permanent one until a new election takes place. At present, there are to be eleven judges and four deputies. The number of judges can, however, be increased to fifteen and the

deputies to six. That is to say, the Court is to consist in first instance of eleven judges and four deputies, and may, upon the proposal of the Council of the League of Nations, be raised to twenty-one (fifteen judges and six deputies).

All judges, titular or deputy, are to be elected for a period of nine years and may be reelected; they remain in office until the vacancy has been filled and finish the cases which they have begun (Article 13).

The judges cannot hold positions which it is supposed will interfere with the impartial performance of their judicial duties (Article 16). They cannot take part in cases with which they have been previously connected (Article 17). In case of doubt, the Court itself is to decide. The seat of the Court is at The Hague and the President (elected by his colleagues) and the registrar or clerk of the court, to be appointed by the judges, must reside in that city. A regular session of the court is to be held each year, beginning on June 15th, unless otherwise provided for in the Rules of Court (Article 23). It is to sit *in pleno,* but if the eleven members cannot be present, deputy judges are to be called in, and if eleven cannot be had by calling upon deputies, a quorum of nine may transact business. Provision is made for a court of three to be appointed annually, which smaller body is competent to hear and decide "in summary procedure" such cases as the parties litigant may care to submit to this method of decision (Article 26).

Some litigants are likely to have judges of their nationality on the bench in cases where the other party has none. Are they to withdraw or are temporary judges to be appointed by the parties in litigation not so represented? That is to say, are all or none to be represented? After much discussion, the first alternative was adopted by Article 28, which permits but does not require parties litigant to appoint temporary judges. If they do, then the temporary judge must meet in every respect the requirements of titular judges and be treated on a footing of equality with the others.

Judges and court officials are to be paid appropriate salaries to be fixed by the Council and Assembly, and may, at the discretion of these bodies, receive pensions on retirement.

So much for the organization of the court. Next as to its jurisdiction.

In the absence of special treaties or conventions to the contrary,

the court only takes cognizance of suits between states (Art. 31), although a state may espouse the cause of its national, and while it is open of right only to members of the League or those states mentioned in the Annex to the Covenant of the League, other states may be permitted to use the court by the Council in accordance with the terms of Article 17 of the Covenant (Article 32).

But diplomacy shall have been resorted to and have failed before the court assumes jurisdiction, unless the parties should by special agreement waive this requirement (Article 33).

Even then not all disputes are to be laid before the court, which is one of limited jurisdiction, unless the parties by special agreement waive the limitations of Article 34. Without such a special agreement, the court can accept and decide only justiciable disputes, provided they fall under the following heads:

(a) the interpretation of a treaty;

(b) any point of international law;

(c) the existence of a fact, which, if established, would constitute the violation of an international agreement;

(d) the nature or extent of reparation due for the breach of an international engagement;

(e) the interpretation of a sentence rendered by the court.

The last of these categories is taken from Article 82 of the Pacific Settlement Convention of the Second Hague Peace Conference of 1907. The others are from Article 13 of the Covenant.

The majority of the Advisory Committee was of the opinion that in such disputes no special agreement of the parties, that is to say, no *compromis,* was necessary as in arbitration. The Japanese member was of the opinion that such a special agreement was necessary. He therefore accepted the article subject to his interpretation. The Italian member preferred the interpretation of his Japanese colleague, but did not go so far as formally to reject the opinion of the majority.

The Council and the Assembly will necessarily have to decide this question, as it is fundamental and cannot be overlooked. It is the distinction between arbitration and judicial procedure; it is the distinction between a tribunal of arbitration and a court of justice. In arbitration the parties define the question and submit the issue to arbiters of their choice; in judicial settlement, each party states its case to the court, which frames the issue and decides it by judges chosen in advance and without reference to the dispute. In arbitra-

tion both parties must appear before the tribunal; in judicial procedure one party may submit its case, present the facts, argue the law and obtain judgment against the other party duly summoned but not appearing.

How is the law to be found and applied to disputes falling under Article 34? This matter is dealt with in Article 35, the text whereof is as follows:

> The Court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order following:
>
> 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> 2. International custom, as evidence of a general practice, which is accepted as law;
>
> 3. The general principles of law recognized by civilized nations.
>
> 4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Of necessity, the Japanese member was opposed to this article, as in his opinion the special agreement would contain such details of this kind as the parties agreed to in the *compromis*.

Finally, it is to be said in this connection that when the court is asked its opinion by the Council or Assembly on a hypothetical case, it may act as a committee of three to five members. When, however, an actual case is laid before it, it sits as a court and renders its opinion in the form of a judgment (Article 36).

The third and last section of the project deals with procedure, and there are only a few matters that need to be specially mentioned in a mere comment.

French is the language of the court, unless the parties, with the consent of the court, authorize the use of another language (Article 37).

The case is to be begun by an application of one of the parties to the clerk of the court. The adverse party or parties and all members of the League are to be notified forthwith. This is necessary for two reasons: the adverse party is not bound to join with the petitioner as in the case of arbitration; and other parties than those mentioned may care to intervene in accordance with Articles 60 and 61.

It may happen that because of actions taken or imminent, the matter in dispute may be prejudiced. Therefore, the project in Article 39, lifted bodily from Article 4 of Secretary Bryan's treaties for the

advancement of peace, signed on September 15, 1914, between France and China and the United States, authorizes the court to suggest to the parties such measures as it may deem necessary to be taken pending the trial and disposition of the case. A like disposition is to be found in Article 4 of the treaty with Sweden of October 13, 1914. This provision is no larger than a man's hand, but it may yet loom large upon the international horizon.

Then follows a series of provisions taken from the Pacific Settlement Convention of the First and Second Hague Peace Conferences, the Draft Convention for a Court of Arbitral Justice and the Prize Court Convention of the Second Hague Peace Conference. For example, the parties are to be represented by agents, advocates, or counsel (Article 40); the procedure is written and oral (Article 41), the written procedure consisting of cases, counter-cases and replies and containing certified copies of the documents relied upon (Article 42), the oral procedure consisting in the hearing of witnesses, experts, agents or counsel before the judges after the court has met for the trial of the case (Article 43).

The President, Vice-President or, in their absence, the senior judge, presides (Article 44) and the hearing is to be public unless the court should decide to hear the case behind closed doors upon the reasoned request of one of the parties (Article 45). Official minutes of proceedings signed by the Registrar and President are to be kept (Article 46). The court may make rules from time to time for the conduct of the cases and fix the time within which the parties are to conclude their arguments and make arrangements for the taking of evidence (Article 47).

It may happen that the parties have not presented all the documents which the court thinks necessary for the proper disposition of the case. The court may therefore ask for their production, and a failure to do so is to be noted (Article 48). The court may have testimony taken or request an expert opinion (Article 49); the judges may put questions to witnesses, experts or representatives of the parties, and the agents and counsel may request the presiding officer to put questions and in case of refusal may appeal to the court from the ruling of the President (Article 50). This provision is very wise, as continental chairmen rule with a high hand and are apparently not in the habit of yielding to counsel. In the further interest of justice, the court may, but is not obliged to, permit the introduction of evi-

dence after the time fixed by the court for its production. Upon the request of both parties the court must admit it (Article 51).

What if one only of the parties appears as a litigant? Can proceedings be had in the absence of the defendant? Yes, says Article 52, in accordance with the procedure devised by and followed in the Supreme Court of the United States. Such cases will be rare, rarer because of the article. But however rare, justice will be done if the court is established and Article 52, which follows, be retained:

> Whenever one of the parties shall not appear before the court, or shall fail to defend his case, the other party may call upon the court to decide in favor of his claim.
>
> The court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 33 and 34, but also that the claim is supported by substantial evidence and well founded in fact and law.

When the case is closed, the court withdraws to consider it in chambers and its deliberations are and remain secret (Article 53), except as their results appear in the judgment, which may be reached by a majority, made, if need be, by giving to the President a casting vote (Article 54).

The judgment states its reasons, mentions the names of the judges taking part in the decision (Article 55), and the dissenting judges have a right to have their dissent or reservations mentioned, but not a statement of their reasons (Article 56). Practice differs in different countries and in different courts. It seemed best to the Committee to require reasons for the judgment but only to permit a statement of dissent; otherwise national judges might be inclined to argue the case of their respective countries in the very judgment of the court to the discredit of judgment and court. Experience will show whether the Committee acted wisely or not.

For purposes of identification the judgment is to be signed by President and registrar (Article 57), and the judgment so rendered and signed is to be final (Article 58); that is to say, final unless a material fact is discovered which, if known before the judgment, was of a kind to have affected the judgment. The fact must have been unknown to the party claiming to have the judgment revised. The court must find that the fact was of this nature and that the ignorance of the party alleging it was not due to negligence. In any event, proceedings in revision cannot be had after the expiration of five

years, and the court may require compliance with the judgment as a condition precedent to revision.

These provisions of Article 59 are not new: they were transferred with slight changes in form from Article 55 of the Pacific Settlement Convention of 1899 and Article 83 of the revised Convention of 1907.

The project has heretofore considered the typical case of a single plaintiff and a single defendant. It may be that a third party has a very real interest and of a legal nature in the decision of the case. It may ask to intervene, and the court decides whether it should be permitted to do so (Article 60). But there is a class of cases in which a third state, and indeed many states, are interested and in which the permission of the court should not be necessary. That is the case of a convention to which more than two nations are parties. Each party to the convention is interested in its interpretation and each may of right intervene in the proceedings. They do so at their peril, as they are bound by the judgment of the court, which could not affect them in point of law, although it would morally, if they did not intervene in the case (Article 61).

Who shall pay the piper? if such a familiar phrase be permitted. The expenses of the court are to be borne by the parties to its creation; the expenses of the parties to the suit are to be borne by the parties in litigation. However, there may be circumstances in which this rule may seem inequitable to the court and the court is authorized to vary it, according to Article 62, the last of the Project.

The court is to find facts, ascertain the law and apply its rules to the facts as found or admitted. This is its sole duty. The execution of a judgment is a matter for the executive. The Advisory Committee therefore left it to the League of Nations to take such action as it might deem advisable in the matter of execution.

Such is in brief, indeed, summary form, the project of the Advisory Committee.

It did not, however, stop here. It felt the need of international conferences to frame rules of law for new cases or cases hitherto considered beyond the domain of law. It therefore unanimously recommended the meeting at stated intervals of conferences for the advancement of international law, as successors to the First and Second Hague Peace Conferences.

The Advisory Committee further suggested to the Council and Assembly the question of organizing a High Court of International

Justice for the trial and punishment of acts committed in the future which may disturb the public order and constitute breaches of international law. The violation of Belgian neutrality and offenses alleged to have been committed by Germany in the World War are of the kind that would be laid before such a tribunal, which is to consist of one representative of each of the nations.

Finally, the Advisory Committee expressed the hope that the Hague Academy of International Law and Political Sciences, established in 1913, and which was to have opened in the month of August, 1914, may begin its labors in the Peace Palace at The Hague alongside of the Permanent Court of Arbitration of The Hague, and the Permanent Court of International Justice to be located at The Hague.

The establishment of the court depends upon the concurrent action of the Assembly and the Council of the League of Nations. If the League should not establish it, or if having created it the League should itself go out of existence, will the court fail? Not if the nations wish to preserve it. They need only accept the unanimous recommendation of the Advisory Committee, call a conference for the advancement of international law, invest the diplomatic corps at The Hague with the powers of the Assembly in so far as the court is concerned, invest an executive committee of the diplomatic corps at The Hague with the powers of the Council. It seems therefore safe to prophesy that whether the League succeeds or whether it fails, the Society of Nations will have a Permanent Court of International Justice, "accessible to all and in the midst of the independent Powers," to quote the memorable language of the preamble to the Pacific Settlement Conventions of the First and Second Peace Conferences at The Hague, which will be, it is hoped, but two links in an ever-lengthening chain by which the nations shall be bound together in justice.

JAMES BROWN SCOTT.

HONORABLE ELIHU ROOT'S LONDON ADDRESS ON ABRAHAM LINCOLN

On August 28, 1920, Mr. Elihu Root presented on behalf of the American people a statue of Abraham Lincoln to the British people to stand in the Canning enclosure in the City of London, within a stone's throw of the Houses of Parliament where the liberty of Eng-